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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 THOMAS J. HOPKINS,

10 Plaintiff,

11 Case No. C11-833-TSZ-BAT

12 v.

13 PHILLIP ALDEN TAVEL et al.,

14 Defendants.

15 **REPORT AND**
16 **RECOMMENDATION**

17 Plaintiff is currently incarcerated at the King County Jail. He has brought an action under
18 42 U.S.C. § 1983 alleging that his public defender is providing him inadequate representation.
19 Complaint at 5.¹ He seeks an injunction ordering his public defender, Mr. Phillip Alden Tavel,
20 to be removed from his case. He also seeks monetary damages from an unnamed director/senior
21 attorney for the Office of Public Defense (OPD), who he alleges is responsible for the overall
22 operations of his public defender's office.

23 The Court recommends that plaintiff's complaint be **DISMISSED**. The complaint fails
24 to state a claim upon which relief can be granted because (1) plaintiff's public defender has not
25 acted under color of law within the meaning of § 1983, and (2) plaintiff has not established that
26 the unnamed director of OPD personally participated in the alleged grievances. In addition,

¹ Plaintiff proceeds in forma pauperis and pro-se.

1 because plaintiff's claims are inextricably intertwined with his pending state criminal trial, the
2 Court should abstain from entertaining this action under *Younger v. Harris*, 401 U.S. 37, 43
3 (1971).

4 **BACKGROUND**

5 Plaintiff alleges he is facing criminal charges and that defendant Tavel is his assigned
6 public defender. Complaint at 3. Initially, defendant Tavel investigated whether plaintiff's
7 criminal case could be resolved in mental health court. *Id.* at 4. After a number of months
8 passed, defendant Tavel informed plaintiff that mental health court was not an option. *Id.* at 5.
9 Plaintiff alleges that the time defendant Tavel spent looking into mental health court was merely
10 a stall tactic. *Id.*

11 Plaintiff alleges that defendant Tavel is unprepared for trial because he has failed to
12 gather evidence and witnesses during the six months plaintiff has been held in custody. *Id.* at 5.
13 He further claims that defendant Tavel has lied to him and intentionally failed to prepare for trial.
14 *Id.* at 6-7. Plaintiff has filed a motion in state court to dismiss counsel, a complaint with the
15 OPD, and a grievance with the Washington State Bar. He claims that defendants have violated
16 his 6th Amendment right to effective assistance of counsel, his 14th Amendment due process
17 rights, and the Rules of Professional Conduct. *Id.* at 8.

18 **DISCUSSION**

19 **A. Defendant Tavel**

20 To sustain a § 1983 civil rights action, plaintiff must show (1) that he suffered a violation
21 of rights protected by the Constitution or created by federal statute, and (2) that the violation was
22 proximately caused by a person acting under color of state or federal law. *See Crumpton v.*
23 *Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Public defenders who perform a lawyer's traditional

1 function as counsel to a defendant in a criminal proceeding are not subject to a § 1983 action.
2 Under those circumstances, a public defender acts independently, not “under the color of law,”
3 as required by § 1983. *Polk County v. Dodson*, 454 U.S. 312 (1981); *Miranda v. Clark County*,
4 *Nevada*, 319 F.3d 465, 468 (9th Cir. 2003). Plaintiff’s claim involves only Mr. Tavel’s actions
5 as a public defender and thus is not actionable under § 1983.

6 **B. Unnamed Director of OPD**

7 A plaintiff must allege facts showing how each individually named defendant in a § 1983
8 action caused or personally participated in causing the harm alleged in the complaint. *See*
9 *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable solely on
10 the basis of supervisory responsibility or position. *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658,
11 691-94 (1978). Rather, a plaintiff must allege that a defendant’s own conduct violated the
12 plaintiff’s civil rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-90 (1989). Here
13 plaintiff claims an unnamed director of OPD is liable for defendant Tavel’s actions because the
14 director is responsible for the “overall operations and administration” of OPD, which assigned
15 plaintiff’s counsel. Complaint at 2. As plaintiff has set forth no facts showing the unnamed
16 director personally participated in the alleged acts committed by Tavel, plaintiff fails to state a
17 claim.

18 **C. Younger Abstention Doctrine**

19 Under the *Younger* abstention doctrine, federal courts, in the interest of comity, must
20 abstain from enjoining state court criminal prosecutions. *See Younger*, 401 U.S. at 43. A federal
21 court must allow state courts to resolve pending matters within their jurisdiction unless a plaintiff
22 can demonstrate that irreparable loss is both great and immediate. *Id.* Plaintiff has not shown
23 that he lacks adequate state remedies. *See Id.* Plaintiff’s criminal trial is pending in the Superior

1 Court of Washington for King County. He has filed an unresolved motion to dismiss defendant
 2 Tavel as well as complaints with the ODP and Washington State Bar Association, all of which
 3 have the potential to offer him redress. He must first rely upon his state court remedies before he
 4 can proceed in a United States District Court. *See Id.* at 45. In light of the fact that plaintiff's
 5 claims are inextricably intertwined with a pending state prosecution, this Court should abstain
 6 from entertaining plaintiff's § 1983 action.

7 Where a pro se litigant's complaint fails to state a claim upon which relief can be granted,
 8 the Court generally grants him the opportunity to amend the complaint. *Lucas v. Dep't of*
 9 Corrections, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam). However, the Court may deny leave
 10 to amend if "it is absolutely clear that no amendment can cure the defect." *Id.* Here, plaintiff
 11 would have to abandon the claims he has asserted and allege an entirely new cause of action
 12 based on an entirely new set of facts in order to proceed with this case. This is more than the
 13 rule of liberally granting leave to amend would seem to require. Accordingly, the Court
 14 concludes that it is not required to grant plaintiff leave to amend. However, plaintiff may submit
 15 an amended complaint with any objections to this Report and Recommendation if he believes he
 16 can cure the defects identified above.

17 CONCLUSION

18 For the reasons discussed above, the Court recommends that Mr. Hopkins' § 1983 action
 19 be **DISMISSED** without prejudice. The Court also recommends plaintiff's motion for discovery
 20 and request that summons be issued be denied as moot, or, in the alternative, as premature. *See*
 21 Dkt. 6, 7.

22 Any objections to this Recommendation must be filed with the Court no later than **June**
 23 **24, 2011.** The failure to timely object may affect your right to appeal.

1 A proposed Order accompanies this Report and Recommendation. The Clerk is directed
2 to provide a copy of this Report to plaintiff and to the Honorable Thomas S. Zilly.

3 DATED this 3rd day of June, 2011.

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6 BRIAN A. TSUCHIDA
7 United States Magistrate Judge
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